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In the Supreme Court of the United States

OCTOBER TERM, 1977

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,
PETITIONERS

v.

THE SUQUAMISH INDIAN TRIBE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.,
Solicitor General,

DREW S. DAYS, III,
Assistant Attorney General,

JAMES W. MOORMAN,
Assistant Attorney General,

LOUIS F. CLAIBORNE,
Special Assistant to the Solicitor General,

WALTER W. BARNETT,
MIRIAM R. EISENSTEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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QUESTION PRESENTED

Whether the Suquamish Indian Tribe has jurisdiction to try non-Indians for misdemeanors when the acts alleged occurred within the Fort Madison Reservation and adversely affect tribal interests.[1]

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[1] In our Memorandum of June 1977, urging this Court to grant Oliphant's petition, we suggested that the *Belgarde* case was distinguishable because the events in *Belgarde* had taken place on non-trust land. In addition, we questioned whether *Belgarde* was a case of sufficient public importance

INTEREST OF THE UNITED STATES

In its role as guardian, the United States has assumed major responsibilities for law enforcement on Indian reservations. These cases require construction of the principal statute defining federal criminal jurisdiction in "Indian country." On the other hand, the United States has for some years been engaged in fostering tribal self-government, providing funds for Indian law enforcement programs. For these reasons, we participated in the district court as *amicus curiae* in the *Oliphant* case, and this Court solicited the views of the United States with respect to the petition in these cases. We deem it appropriate, in the circumstances, to express our views on the merits.

STATEMENT

1. These cases arise out of petitions for habeas corpus in the United States District Court for the Western District of Washington, challenging the jurisdiction of the Suquamish Indian Provisional Court to try petitioners, non-Indian residents of the Port Madison Reservation in Kitsap County, Washington, for misdemeanors alleged to have been committed within the boundaries of the reservation. The peti-

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to warrant deviation from normal appellate processes—the judgment not having been reviewed by the court of appeals. Accordingly, we stated the "question presented" by *Oliphant* only, and urged that certiorari be denied in *Belgarde*.

We assume, however, that the Court has determined to review both cases and we therefore address the issues raised by both. Moreover, the submission we now make applies equally to the two cases.

tion of Mark David Oliphant was filed on August 23, 1973, and denied by the district court on April 5, 1974 (Pet. App. A 1-7); that denial was affirmed by the Court of Appeals for the Ninth Circuit on August 24, 1976 (Pet. App. A 8-33; 544 F. 2d 1007). The petition of Daniel B. Belgarde was filed on November 6, 1974, and denied, upon recommendation of a United States Magistrate (Pet. App. A 34-49), on August 18, 1975 (Pet. App. A 50-51). Belgarde filed a timely notice of appeal to the Court of Appeals for the Ninth Circuit (Pet. 14), but no decision has been rendered by that court. This Court granted a joint petition for a writ of certiorari on June 13, 1977.

2. The material facts in these cases are set forth in the district court opinion in *Oliphant* (Pet. App. A 1-4), and in the Report and Recommendations of a United States Magistrate in *Belgarde* (Pet. App. A 34-36), which the United States District Court for the Western District of Washington subsequently adopted (Pet. App. A 50-51).

The Port Madison Reservation is located entirely within the State of Washington. Created by the Treaty of Point Elliott of January 22, 1855 (ratified in 1859, 12 Stat. 927), the reservation was a remnant of the aboriginal territory of the Suquamish and other allied Tribes and is still the home of the Suquamish Indian Tribe.[2] The reservation consists

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[2] The Port Madison Reservation, involved here, is in fact the first of four non-contiguous areas the Tribes reserved in the treaty. Art. II; See Royce, *Eighteenth Annual Report of the Bureau of American Ethnology* 798-801 and Maps 60 and 63 (1899). There was also a larger "general reservation," to

of more than 7,000 acres, of which approximately 36 percent are allotments held in trust for individual Indians pursuant to the Indian General Allotment Act of 1887 (24 Stat. 388, 25 U.S.C. 331 *et seq.*) and its amendments. In addition, there remain 41 acres of tribal lands, held in trust by the United States.

The Suquamish Tribe is organized under the Indian Reorganization Act of 1934 (48 Stat. 984, 987, 25 U.S.C. 476 *et seq.*). In 1965 the Tribe adopted a Constitution and By-Laws, which the Secretary of the Interior approved,[3] and in 1973 it enacted a Judicial Code creating a tribal trial court and court of appeals (Pet. App. B 39 *et seq.*). Section 3 of Art. III of the Code (*id.* at 41-42) states that the tribal court shall have original jurisdiction over all but "major crimes" [4] committed by Indians or non-Indians occurring anywhere on the reservation. The code was enacted by the tribal membership in full meeting

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which the President was authorized to remove the Tribes signatory to the Treaty of Point Elliott as well as "all the Indians living west of the Cascade Mountains in the [Washington] Territory." Arts. III and VII. The Suquamish, however, were never so removed and the Port Madison Reservation became their exclusive domain. By Executive Order, the reservation was enlarged in 1864 (see Royce, *supra*, at 834-835 and Maps 61 and 62). Subsequently it was slightly diminished by an Agreement of 1904, ratified by Congress in 1905. 33 Stat. 1078.

[3] Selected portions of the Constitution and By-Laws are reprinted at Pet. App. B 6-8.

[4] As defined in 18 U.S.C. 1153; but see the limitations on tribal powers set forth in the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. 1302.

(Supplementary Record 4, hereinafter, "Supp. R.")[5] pursuant to Art. IX of the Constitution and By-Laws, and is considered by the Department of Interior as valid without secretarial approval. Prior to the Oliphant incident, notices had been placed in prominent places at the entrances to the Port Madison Reservation that entry onto the reservation would be deemed implied consent to the jurisdiction of the Suquamish tribal court (Supp. R. 8).

3. In August 1973 the Suquamish Tribe was planning to celebrate its annual Chief Seattle Days festival. Anticipating that a great many people would be congregating in a small area near the traditional tribal camp grounds, the Tribe requested that Kitsap County provide law enforcement assistance, but only one deputy was available for a single eight-hour period during the festival weekend. The Tribe also requested law enforcement assistance from the Bureau of Indian Affairs, but was told that it would have to provide its own law enforcement out of tribal funds with tribal personnel (*id.* at 11).

On August 19, 1973, during Chief Seattle Days, at an early-morning hour, Mark David Oliphant, a

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[5] The record and supplementary records cited here are those in the court of appeals. There was no evidentiary hearing in the *Oliphant* case. Counsel for the Tribe had made a number of factual assertions in his Memorandum of Authorities of September 10, 1973 (Supp. R. 1-13) and Additional Memorandum of Additional Respondents of January 14, 1974 (Supp. R. 116-155). The facts so asserted were attested to by Tribal Chairman Richard Belmont, Jr. (Supp. R. 156).

non-Indian resident of the reservation (Supp. R. 8), was arrested by tribal authorities for assaulting a tribal officer and resisting arrest (*id.* at 1, 11).[6] The Bureau of Indian Affairs Incident Complaint Report alleges that while tribal deputies had been patrolling the encampment grounds, they had come upon Oliphant "beating up some of the people who were camping there" (Ex. U.S.-8 to United States Memorandum of Authorities, Supp. R. 101-115), and that when the deputies tried to break up the fight, Oliphant assaulted one of them and tried to run away, but was caught and arrested (Ex. U.S.-8). The alleged acts of Oliphant and his arrest both occurred upon the land held in trust for the Tribe by the United States.

Oliphant was arraigned before the tribal court, and bail was set at $200. He did not put up bail and was briefly incarcerated in a local city jail until his release on his own recognizance.[7] On August 23, 1973, Oliphant petitioned for a writ of habeas corpus in the United States District Court for the Western District of Washington, pursuant to 25 U.S.C. 1303 (the Indian Civil Rights Act of 1968), challenging the jurisdiction of the Suquamish Provisional Court to try him, a non-Indian, for acts allegedly committed on the reservation (Record on Appeal, hereinafter "R.",

[6] See Chapter III, Tribal Code (Pet. App. B 47): Assault (30 days and/or $60); resisting arrest (60 days, $120) (Pet. App. B 48, 64).

[7] The city houses tribal prisoners by agreement with the United States Department of the Interior (Pet. App. A 2).

1-4).[8] No further action has been taken in the tribal court pending this Court's decision.

4. Daniel B. Belgarde, a non-Indian resident of the Port Madison Reservation, was arrested by tribal authorities on October 12, 1974, on a state highway on the reservation. According to the reports of tribal police officers, Belgarde had been driving recklessly and at high speed on the streets of Suquamish, Washington (which is located wholly within the boundaries of the reservation), pursued by two tribal police vehicles. When the police cars succeeded in blocking his path, it was alleged, Belgarde collided with one of them. Thereafter, Belgarde submitted to arrest. The tribal officers then called the Kitsap County Sheriff's Office, and an officer of the Sheriff's Office and a state patrolman arrived. Neither would take any action against Belgarde (Pet. App. A 35).

Belgarde was taken by tribal police officers to Port Angeles City Jail, another contract holding facility for the Suquamish tribal court, where he posted bail and was released. He was arraigned on October 18, 1974, and charged under the Tribal Code with "recklessly endangering another person" (on a county road) and injuring tribal property (on the state

[8] The district court did not address the issue of post-release eligibility for habeas corpus relief. The court of appeals, however, held that "Oliphant's release on his own recognizance [on August 24, 1973] did not deprive the district court of [habeas corpus] jurisdiction," citing *Hensley* v. *Municipal Court*, 411 U.S. 345 (Pet. App. A 9). Respondents do not now challenge this holding.

highway).[9] Further proceedings were held in abeyance by the tribal court pending disposition of Belgarde's petition for habeas corpus which was filed on November 6, 1974, in the United States District Court for the Western District of Washington, and no further action has been taken (Pet. App. A 35-36).

INTRODUCTION AND SUMMARY OF ARGUMENT

1. These cases present a question of Indian law of first impression. The decisions of the district court and the court of appeals in *Oliphant* appear to be the first reported decisions ever to have squarely decided whether Indian tribal courts have jurisdiction over offenses committed by non-Indians on the reservation. During the 19th Century, two opinions of the Attorney General (2 Op. Atty. Gen. 693 (1834); 7 Op. Atty. Gen. 174 (1855)) and *dictum* in a single federal case (*Ex parte Kenyon*, 14 Fed. Cas. 353 (C.C., W.D. Ark.) (No. 7,720)) stood for the proposition that tribal courts lacked such jurisdiction. But the matter is ripe for re-examination, taking into account both historical understandings and current realities.

Since 1855, federal Indian policy has changed direction a number of times, and the impact of each phase is visible in contemporary Indian life. As a consequence of late 19th and early 20th Century assimilationist policies, many reservations today are "check-

[9] See Suquamish Law and Order Code, Chapter III, Art. I, Sections 44 (Injury to Public Property: 30 days or $100) and 59 (Recklessly Endangering Another Person: 6 months or $500), Pet. App. B 59 and 63.

erboards," inhabited by Indians holding trust allotments or living on tribal trust lands and non-Indians holding and living on lands held in fee, the latter sometimes (as in these cases) outnumbering the former. On the other hand, due in large part to the Indian Reorganization Act of 1934, tribal identity has been reinforced and tribal governments have been revitalized.

Most recently, the main thrust of federal policy has been to strengthen tribal autonomy, as is reflected in such enactments as the Indian Civil Rights Act of 1968 (82 Stat. 77, 25 U.S.C. 1301 *et seq.*) and the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203, 25 U.S.C. (Supp. V) 450 *et seq.*). Functioning tribal governments have, additionally, received funds, like other political subdivisions, from the United States under the general revenue sharing program (State and Local Fiscal Assistance Act of 1972 (86 Stat. 919, 925, 31 U.S.C. (Supp. V) 1227(b)(4)) and State and Local Fiscal Assistance Amendments of 1976 (Pub. L. 94-488, 90 Stat. 2341) and from the Law Enforcement Assistance Administration under the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 197, 209) and its amendments (42 U.S.C. 3781(d)).

At present, according to the Department of Interior, tribal courts are operating on approximately 71 reservations and more than 30 Tribes have enacted ordinances asserting criminal jurisdiction over non-Indians. This is, at least in part, a reflection of Indian disappointment with the way in which some of the States that have assumed jurisdiction under

the Act of August 15, 1953, 67 Stat. 588 (Public Law 280), have carried out law enforcement activities on the reservations. See 1 Justice and the American Indian, *The Impact of Public Law 280 upon the Administration of Justice on Indian Reservations*, National American Indian Court Judges Association 5-10 (1974). As these cases demonstrate, state officials do not always prove responsive to tribal needs. Federal authorities, on the other hand, are often remote and unavailable to protect tribal interests. See Hearings on S. 1 and S. 1400 (Reform of the Federal Criminal Laws) before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., Part VIII, pp. 6469 *et seq.* (1973).

In many instances, therefore, the role of tribal law and tribal courts is to fill a hiatus. In our view, assertion of tribal jurisdiction, within the limits of existing law, is a positive development, consonant with the dual goals of increased Indian self-government and improved law enforcement on the reservation.

To be sure, this Court cannot, in these cases, precisely fix the boundaries of tribal jurisdiction, particularly with respect to non-Indians. Nor is it possible at this time to anticipate and solve all the problems to which exercise of tribal power may give rise. Perhaps, at the end of the day, further legislation will be needed. But whether that is so depends in large measure upon an authoritative interpretation of present law. That is, of course, the province of the Court.

2. We believe that existing law permits the assertion of tribal criminal jurisdiction with respect to minor offenses throughout Indian reservations whenever tribal interests are affected. And that includes cases like these, in which a non-Indian resident of the reservation assaults tribal officers or damages tribal property.

In order to establish that proposition, we address the several arguments against the assertion of tribal jurisdiction: (a) that it never existed with respect to non-Indians, except insofar, if at all, as it was conferred by delegation from the United States; (b) that any such authority was voluntarily surrendered by the Tribe more than a century ago; (c) that tribal criminal jurisdiction over reservation offenses committed by non-Indians was pre-empted by federal statutes (the predecessors of 18 U.S.C. 1152) that made federal law and federal courts exclusive in such cases; and, finally, (d) that the State of Washington, pursuant to Public Law 280, has validly asserted, and not retroceded, exclusive jurisdiction to deal with situations like those presented here. In very brief outline, our responses are these:

(a) We begin (*infra*, pp. 13-20) by establishing that jurisdiction to try non-Indians who commit offenses on lands reserved by the Tribe, at least when they implicate tribal interests, is an aspect of residual tribal autonomy which survived the loss of external sovereignty. Presumptively, we say, the Tribe has retained such jurisdiction and the only question is

whether it has been lost by voluntary surrender or taken away.

(b) To determine whether there is any basis for suggesting that the Suquamish gave away the jurisdiction now asserted, we briefly examine the Treaty of Point Elliott and the subsequent Agreement of 1904 (*infra*, pp. 20-25). Our conclusion is that there was no voluntary surrender.

(c) We turn next (*infra*, pp. 25-46) to the principal issue: whether 18 U.S.C. 1152 ousts tribal jurisdiction in those cases in favor of exclusive federal jurisdiction. On this point, we present two alternative submissions. The first is that, since the Treaty of Point Elliott should be read as reserving exclusive criminal jurisdiction to the Tribe with respect to offenses committed on the retained lands, Section 1152 is by its own terms inapplicable. We note that, today, this conclusion encounters no insuperable obstacles because the Indian Civil Rights of 1968 has enacted procedural safeguards and severely limited the sentencing powers of tribal courts.

Alternatively, we submit that if the "treaty" exception of Section 1152 is not satisfied, nevertheless the assertion of federal jurisdiction does not oust any subsisting tribal authority. As a matter of statutory construction, applying traditional presumptions, we conclude that Section 1152 only imposes a *concurrent* federal jurisdiction in cases like these.

(d) Finally, we allude to the state claim of jurisdiction (*infra*, pp. 46-59). We advert to the question whether Washington's 1963 statute, purportedly

enacted pursuant to Public Law 280, reaches the *Oliphant* case (where the incident occurred on tribal trust lands), and whether, for both cases, that statute validly pre-empts concurrent tribal jurisdiction. But we do not attempt to resolve those issues, pointing out that the court of appeals has invalidated the 1963 law on constitutional grounds in another case which is now on appeal to this Court. We also note that other non-constitutional arguments, involving a construction of Public Law 280, cast doubt on the validity of the state statute.

In those circumstances, we urge the Court not to decide these cases until it has determined what action it will take in the pending *Yakima* case (*Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, No. 77-388, appeal docketed September 12, 1977), and, if the Court grants plenary review there, to set these cases for argument at the same time.

ARGUMENT

THE SUQUAMISH TRIBAL COURT HAS JURISDICTION TO TRY AND PUNISH MINOR OFFENSES COMMITTED ON THE PORT MADISON RESERVATION BY NON-INDIANS AGAINST INDIANS OR INDIAN PROPERTY OR WHICH OTHERWISE SIGNIFICANTLY AFFECT TRIBAL INTERESTS

A. The Presumption In Favor Of Tribal Jurisdiction

1. Speaking for the United States, it is appropriate that we begin by reminding ourselves—as the Court has in almost all its decisions from *Worcester* v. *Georgia*, 6 Pet. 515, to *United States* v. *Antelope*, No. 75-661, decided April 19, 1977—that the surviving In-

dian Tribes within this country were once independent nations, enjoying all the powers of sovereign states. That historic fact retains significance because, although it might have chosen wholly to abrogate tribal autonomy from the beginning, the federal government has always recognized a measure of residual independence in the Tribes and, perhaps more than ever before, that is now the national policy. In consequence, when tribal authority is challenged, the source being known, one does not look for a delegation of power; the focus is, rather, upon whether there is evidence that it has been lost. And, in answering that question, all official acts, legislative or executive, by the federal or state governments that are claimed to deprive the Indians of their residual sovereignty must be examined critically and ambiguities resolved in favor of tribal autonomy. See, *e.g.*, *United States* v. *Nice*, 241 U.S. 591, 599-601; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174; *DeCoteau* v. *District County Court*, 420 U.S. 425, 447; *Bryan* v. *Itasca County*, 426 U.S. 373, 392-393.

This is not to suggest, of course, that Indians as such enjoy a presumptive exemption from the white man's laws, no matter where and how they live. Our concern is only with tribal jurisdiction within the confines of a reservation where Indians maintain tribal relations. Within those boundaries, we say, internal governmental power presumptively remains with the Tribe, at least so far as the welfare of the resident Indian community is affected. See *Williams* v. *Lee*, 358 U.S. 217.

To be sure, the tribal claim to self-rule is at its strongest when it reaches Indians alone. *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 179-180; *Fisher* v. *District Court*, 424 U.S. 382; *Bryan* v. *Itasca County*, *supra*; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463. But, as *Williams* v. *Lee* sufficiently illustrates, tribal jurisdiction is essentially *territorial* and it normally encompasses activities by non-Indians on the reservation which importantly affect tribal members. See, also, *Warren Trading Post* v. *Tax Comm'n*, 380 U.S. 685; *Kennerly* v. *District Court of Montana*, 400 U.S. 423; *United States* v. *Antelope*, *supra*, slip op. 4-5.[10] And this is

[10] Cases like *United States* v. *Winans*, 198 U.S. 371, *Tulee* v. *Washington*, 315 U.S. 681, *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, *Menominee Tribe* v. *United States*, 391 U.S. 404, and *Antoine* v. *Washington*, 420 U.S. 194, which recognize tribal rights *beyond* the boundaries of the reservation—and presumably the Tribe's authority to control its members in the exercise of those rights—are no exception to the territorial principle. On the contrary, those cases enforce privileges which attach to *particular areas*, formerly within tribal lands, but later ceded to the United States with a reservation of certain rights.

Nor do decisions which recognize *federal* authority over Indians outside a reservation impair the principle that *tribal* jurisdiction is essentially territorial. See, *e.g.*, *United States* v. *Holliday*, 3 Wall. 407; *Perrin* v. *United States*, 232 U.S. 478; *Morton* v. *Ruiz*, 415 U.S. 199. Although federal jurisdiction over Indians is usually territorial—confined to "Indian country" (see 18 U.S.C. 1151-1153)—by virtue of the Indian Commerce Clause of the Constitution, Congress may regulate white-Indian intercourse without regard to situs.

Of course, in stressing the territorial principle, we do not mean to question the Tribe's authority, for some purposes at least, over its own members living outside the reservation,

so even though the conduct occurs on non-Indian land within a reservation.[11] *Seymour* v. *Superintendent*, 368 U.S. 351; *United States* v. *Mazurie*, 419 U.S. 544, 556-558; *DeCoteau* v. *District County Court*, *supra*, 420 U.S. at 427 and n.2. Compare *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145.

These principles are fully applicable to the exercise of jurisdiction by courts, both in civil and criminal cases arising out of conduct within an Indian reservation. *DeCoteau*, *supra*, 420 U.S. at 427 n. 2. Thus, when both the wrongdoer and his victim are non-Indians and tribal interests are not directly implicated, state courts have been conceded competence. *United States* v. *McBratney*, 104 U.S. 621; *Draper* v. *United States*, 164 U.S. 240; *New York ex rel. Ray* v. *Martin*, 326 U.S. 496.[12] But it is otherwise when an Indian is involved, whether as a victim or wrongdoer, *Donnelly* v. *United States*, 228 U.S. 243, and, *a fortiori*, when both parties are Indians residing on the reservation. *United States* v. *Kagama*, 118 U.S. 375; *Fisher* v. *District Court*, *supra*.

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or the competence of tribal courts to deal with offences committed by members beyond the reservation. We need not here explore the limits of any such jurisdiction.

[11] Provided, of course, the reservation subsists. Compare *Mattz* v. *Arnett*, 412 U.S. 481, with *DeCoteau* v. *District County Court*, 420 U.S. 425, and *Rosebud Sioux Tribe* v. *Kneip*, No. 75-562, decided April 4, 1977.

[12] While the *McBratney* rule is often stated shortly as conceding to the state exclusive jurisdiction of all offenses by non-Indians against non-Indians, an exception may exist for actions which otherwise significantly affect tribal interests. See *New York ex rel. Ray* v. *Martin*, *supra*, 326 U.S. at 498, 500-501. Although we need not explore the breadth of that exception here, we suggest that it includes offenses against public safety which endanger the entire community, without there being any identifiable Indian "victim."

While in some of the cases in which state jurisdiction within a reservation is denied, the result is explained as immediately grounded on federal pre-emption, that is not inconsistent with recognition of inherent tribal autonomy as the starting point.[13] As the Court has consistently emphasized, the residual sovereignty of the Tribe, independently of any federal regulation, is enough to bar state courts from interfering in reservation affairs when tribal interests are implicated. See, *e.g.*, *Fisher* v. *District Court*, *supra*, 424 U.S. at 386-389.

The same principle governs when the issue is between *federal* and tribal jurisdiction. Unlike the state, the United States has plenary power to regulate Indian affairs within a reservation. But, until and unless Congress asserts federal jurisdiction, authority to resolve disputes arising on the reservation which affect Indian interests remains with the Tribe. See 55 I.D. 14, 57. Federal laws, even the Constitution, do not reach within a reservation in the absence of an

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[13] Typically, the pre-emption doctrine is invoked to oust state attempts to regulate commerce between whites and Indians and to immunize reservation Indians from state taxes. See, *e.g.*, *Warren Trading Post* v. *Tax Comm'n*, *supra*; *United States* v. *Mazurie*, *supra*; *McClanahan* v. *Arizona State Tax Comm'n*, *supra*. Even then, however, the residual autonomy of the tribes is a relevant consideration. See *Warren*, *supra*, 380 U.S. at 690; *Mazurie*, *supra*, 419 U.S. at 555-559; *McClanahan*, *supra*, 411 U.S. at 172-173; *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 376-377 n. 2.

express congressional directive. See *Ex Parte Crow Dog*, 109 U.S. 556, 571-572; *Talton* v. *Mayes*, 163 U.S. 376, 384; *United States* v. *Quiver*, 241 U.S. 602, 605-606. As the Court said in *Williams* v. *Lee*, *supra*, 358 U.S. at 220, with particular reference to criminal cases, "if the crime was by or against an Indian, tribal jurisdiction * * * has remained exclusive"—unless jurisdiction was "expressly conferred on other courts by Congress." In sum, here, too, when tribal interests within the reservation are directly affected, the presumption is that tribal courts are the competent tribunal and our only inquiry is whether their jurisdiction has been taken away.

2. We submit that these principles govern both the present cases. The events underlying each prosecution occurred wholly within the boundaries of the Port Madison Reservation, the reserved portion of the aboriginal lands of the Suquamish Tribe. Although about two-thirds of the acreage is today in non-Indian hands and only a small fraction of the reservation population is Indian, there is no suggestion that the reservation has ceased to exist or that its extent has been diminished since 1905. Nor is there any doubt that the Suquamish, few as they are, maintain tribal relations: they have adopted a constitution and a code of laws, which, among other things, establish tribal courts with jurisdiction over defined offenses committed within the reservation.

In the *Oliphant* case, it is plain that the acts alleged constitute a direct interference with tribal affairs. As we detailed in the Statement, *supra*, pp. 5-6,

Oliphant was apparently disturbing Indians attending the annual tribal celebrations, being held on the few remaining acres of unallotted tribal lands, when tribal officers sought to restrain him. The charges against him are that he then assaulted one of these officers and resisted their efforts to arrest him.

The facts of the *Belgarde* case perhaps less obviously implicate tribal interests, but, in our view, they nevertheless justify the assertion of tribal jurisdiction. Although the driving incident underlying the charges occurred on non-Indian lands within the reservation, it presumably threatened the safety of Indian residents. Moreover, one of the accusations is that Belgarde "destroyed tribal property" in that, when tribal police, in a vehicle owned by the Tribe, successfully blocked his path, he deliberately or recklessly collided with the police car. That, we submit, brings the case within the principles we have just outlined.

Of course, the issue is not finally resolved when we conclude that incidents occurring within the boundaries of an Indian reservation implicate tribal interests and are therefore presumptively subject to tribal court jurisdiction. But, if this is not the end of the inquiry, it is more than a mere starting point. The presumptive authority of the Tribe to deal with the matter must inform our analysis throughout as we answer the only remaining question: Did this Tribe lose its prerogative to adjudicate cases of this kind, and, if so, how?

There are three different ways in which tribal jurisdiction can be lost: (1) by voluntary surrender,

(2) by federal supercession, and (3) by State action pursuant to congressional authorization. In the present case, all three claims are advanced and we deal with them in turn.

B. The Absence Of Voluntary Surrender

It goes without saying that tribal prerogatives can be relinquished. Sometimes, this has happened simply by the loss of tribal identity, all members voluntarily leaving the reservation, if one existed, and wholly integrating themselves into white society. No such claim is advanced here. On the other hand, tribal powers of self-government are not lost merely by failure to exercise or assert them, even over a long time. See, *Mattz* v. *Arnett*, *supra*, 412 U.S. at 497-503; cf. *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 113-117.[14]

But, subject to certain conditions (see *Kennerly* v. *District Court of Montana*, *supra*), a tribe may surrender all or part of its autonomy by a formal act. Since 1968, by virtue of congressional authorization, such a cession of jurisdiction may be made to the State

[14] Neither *DeCoteau* v. *District County Court*, *supra*, nor *Rosebud Sioux Tribe* v. *Kneip*, *supra*, remotely suggests anything of the kind. On the contrary, those decisions rest on the premise that tribal and federal authority give way to state jurisdiction *only* when the reservation is terminated or diminished by congressional action. *E.g.*, *DeCoteau*, *supra*, 420 U.S. at 427 n. 2. While the absence of a tribal government or tribal acquiescence in state jurisdiction is noted (*DeCoteau*, *supra*, 420 U.S. at 442-443; *Rosebud Sioux Tribe*, *supra*, slip op. 19-21 and n. 27), this is viewed as relevant to construing an earlier Act of Congress. There is no hint that, absent congressional action, tribal powers can be lost by desuetude.

if it is willing to accept it. 25 U.S.C. 1321. Again, that is not suggested in these cases. More relevant, however, is the common example of a surrender to the United States of some tribal authority over reserved lands, by the original treaty establishing an Indian reservation, or by subsequent agreement. It is said that happened here.

The pertinent treaty in these cases is the Treaty of Point Elliott, concluded in 1855 and ratified in 1859. 12 Stat. 927. By that agreement, the Suquamish and other allied Tribes ceded to the United States a substantial part of their aboriginal lands, reserving a tract for themselves.[15] This "reservation" was expressly "set apart * * * for their exclusive use," and it was further stipulated that "[no] white man [shall] be permitted to reside upon the same without permission of the said tribes or bands * * *." Art. II, 12 Stat. at 928. While allotments were authorized, these were to be only to members of the Tribes. Art. VII, 12 Stat. at 929; see Treaty with the Omahas, Art. 6, 10 Stat. 1043, 1044.[16]

There is in these provisions nothing arguably amounting to an abdication of the right of self-rule

[15] See note 2, *supra*.

[16] While the Treaty of Point Elliott ambiguously mentions allotments to "such individuals or families as are willing to avail themselves of the privilege," it goes on to say that such allotments are to be made "on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas," and the cited provision expressly limits allotments to an "Indian or Indians of said tribe." See *United States* v. *Celestine*, 215 U.S. 278, 286.

within the lands retained by the Tribe. On the contrary, as we elaborate in a moment (*infra*, pp. 33-34), because whites were excluded from the reservation except only as the Tribe itself might admit them, the fair implication is that the Suquamish retained full internal sovereignty, albeit over a diminished territory.

We turn, then, to Article IX of the Treaty (12 Stat. at 929),[17] which the court of appeals suggested worked a "significant surrender of internal autonomy" (Pet. App. A 11)—although not affecting tribal jurisdiction over the charges laid in the *Oliphant* case. In our view, the concession is too generous. As we read the provision, the only "surrender" is of *external* independence, not internal autonomy, and this is accomplished, not by the "extradition clause," but by the Tribes expressly "acknowledg[ing] their dependence

[17] ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

on the government of the United States." The effect of the quoted words is, we believe, the same as the common acknowledgment in earlier Indian treaties, including the Treaty of Holston with the Cherokees (Art. II, 7 Stat. 39), that the Tribe would henceforth be under the exclusive "protection" of the United States. And that acknowledgment, we know, did not deprive the Indians of their internal autonomy, or the power to punish non-whites admitted to their reservation. See *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 16-17; *Worcester* v. *Georgia*, *supra*, 6 Pet. at 551-552, 553, 560-561.

The balance of Article IX does not, we submit, cede any tribal prerogatives, expressly or impliedly. There is, first, a pledge by the Tribe not to "commit * * * depredations on the property of * * * citizens [of the United States]," and not to "make war on any other tribe except in self-defence," or commit depredations on their property. In light of the general prohibition on whites or other Indians entering the reservation, this is obviously a reference to *off*-reservation acts and is no more an abandonment of internal sovereignty than a comparable agreement between two fully independent nations with a common boundary. Nor does the assumed obligation to make restitution or pay compensation when tribal members commit such depredations subtract anything from the Tribe's powers of self-government within its own territory. Again, it is an undertaking any sovereign nation might give.

Finally, we reach the clause of Article IX by which the Tribes "agree not to shelter or conceal offenders

against the laws of the United States, but to deliver them up to the authorities for trial." Read in isolation, this provision might be understood to cover offenses committed within the reservation. But, in context, the clause is no more than an extradition agreement for crimes occurring off the reservation, within the jurisdiction of the territorial government. Cf. *Ex Parte Crow Dog*, *supra*, 109 U.S. at 567-568. Indeed, in light of the exclusive focus of Article IX on depredations committed *by tribal members*, it seems unlikely that the provision reaches any but Indians. Whether that be so or not, however, we see here no surrender of internal jurisdiction: the clause does no more than obligate one sovereign to deliver up fugitives who have offended on the territory of another sovereign nation and ought, in accordance with usual international convention, be delivered up to be punished by the latter.[18]

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[18] The extradition character of the clause is perhaps even more clearly revealed when we view it in the context of the somewhat fuller "depredations" provision of the contemporary Treaty with the Blackfoot Indians (Art. 11, 11 Stat. 657, 659):

> The aforesaid tribes acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and to commit no depredations or other violence upon such citizens. And should any one or more violate this pledge, and the fact be proved to the satisfaction of the President, the property taken shall be returned, or, in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities. The aforesaid tribes *are hereby bound to deliver such offenders to the proper authorities for trial and punishment* and are held responsible in their tribal capacity, to make reparation for depredations so committed.
>
> Nor will they make war upon any other tribes, except in self-defence, but will submit all matters of difference between themselves and other Indians to the government of the United States, through its agent, for adjustment, and will abide thereby. *And if any of the said Indians*, parties to this treaty, *commit depredations on any other Indians* within the jurisdiction of the United States, *the same rule shall prevail as that prescribed in this article in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial* [emphasis added].

In sum, neither Article IX nor any other provision of the Treaty of Point Elliott abdicates the Tribe's authority to apply its own laws, through its own tribunals, to offenses committed within its reserved lands. Nor does anything in the only other agreement between the Suquamish Tribe and the United States, the Agreement of May 28, 1904, ratified by Congress the following year. 33 Stat. 1078. That transaction involved only the cession of a small portion of tribal lands, and it expressly reserves all "benefits" to which the tribal members are entitled under the earlier treaty.

Having concluded that the Suquamish did not voluntarily surrender their internal autonomy, we turn to consider whether it was taken from them. First, we examine the claim that congressional action has imposed exclusive federal criminal jurisdiction within the Port Madison reservation, except only for minor offenses committed by one Indian against another.

C. The Existence And Extent Of Federal Jurisdiction

As we have already noted, the question is not whether Congress *could have* extinguished tribal criminal jurisdiction within the Suquamish reservation, but whether it *did*. The suggestion is that, insofar as crimes involving non-Indians are concerned, this result is accomplished by 18 U.S.C. 1152.[19]

1. That provision derives from very early statutes, of 1790, 1796, 1802, 1817 and 1834. But, because the Suquamish Treaty was signed in 1855 and ratified in 1859, we need only go back as far at 1854, when the 1834 Act (4 Stat. 729, 733) was last amended (10 Stat. 269, 270). In all material particulars, the law was then settled in its present form. The provision extends the federal criminal laws to "Indian country"—which includes all lands within an Indian reservation, whether patented or not and regardless of the race of the owner (18 U.S.C. 1151)—with three exceptions:

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[19] The Major Crimes Act, 18 U.S.C. 1153, is irrelevant to these cases since, (1) it reaches only offenses committed by Indians, and (2) the only offenses covered are 13 enumerated "major" crimes, not including those involved here. That statute, first enacted in 1885, merely shows that the Congress *then* apparently thought Section 1152 covered offenses by non-Indians on reservations but not, or not always, offenses by Indians against non-Indians. Whether the Major Crimes Act supplements, or rather supersedes, tribal jurisdiction is not settled in this Court. See *Talton* v. *Mayes*, *supra*, and *Keeble* v. *United States*, 412 U.S. 205, 214. But, as a practical matter, that question has been mooted by the provision of the Indian Civil Rights Act that so limits the sentencing power of tribal courts as to disable them from dealing with major crimes. See 25 U.S.C. 1302(7).

(1) "offences committed by one Indian against the person or property of another Indian";
(2) "any Indian committing any offence in the Indian country who has been punished by the local law of the tribe"; and
(3) "any case where, by treaty stipulations, the exclusive jurisdiction over such offences is or may be secured to the Indian tribes respectively."

The present cases do not fall within either of the first two exceptions, limited as they are to offenses committed *by* Indians. Accordingly, we focus on the third exception, which obviously reaches cases in which the wrongdoer is not an Indian.[20] This "treaty" provision of Section 1152, written in 1854, supposes that there were then subsisting Indian treaties which reserved to the Tribe exclusive jurisdiction to deal with offenses occurring within the limits of its reservation, regardless of the race of the accused. And, as

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[20] On its face, the "treaty" exception covers *any* offense which the Tribe has reserved jurisdiction to deal with, whatever the race of the wrongdoer and victim. Of course, in the light of the first exception, it is superfluous where the accused is an Indian and the crime is against another Indian or his property. And, by virtue of *United States* v. *McBratney*, *supra*, and it progeny, the treaty exception is unnecessary to oust *federal* jurisdiction where both wrongdoer and victim are non-Indians. But see note 12, *supra*, as to the effect of the *McBratney* rule on reserved tribal jurisdiction. Thus, however broad the treaty reservation of exclusive jurisdiction. the "treaty" clause of Section 1152 is relevant in only two situations: offenses committed by an Indian against a non-Indian (and who has not been punished by tribal law) and, most relevantly, offenses committed by a non-Indian against an Indian or Indian property.

the addition of the words "or may be" indicates, it was contemplated that there would be like treaties in the future. The question is whether the Treaty of Point Elliott, signed a few months later, is one of these.

If one were to ignore all other considerations and were faithfully to apply the presumption in favor of retained tribal authority and the applicable canons of construction, an affirmative answer would seem to be called for. To begin with, there is, as we have seen, no express or implied cession of internal jurisdiction. Although the President of the United States—presumably viewed as the "Supreme Arbitrator"—is recognized as having authority to select the location of the ultimate reservation and to allot lands to individual Indian families, the treaty nowhere suggests that federal *law* shall cross the reservation boundaries. Significantly, even when it comes to violating the ban on importing "ardent spirits," the guilty Indian is not to be punished in accordance with existing law,[21] but is merely to forfeit financial benefits. Art. X, 12 Stat. at 929.

It might be argued that the treaty's silence about the applicability of federal law inside the reservation is an oversight, or that it reflects a consequence of "dependence" so well understood that it did not need

[21] There were, of course, federal laws in effect prohibiting the introduction of intoxicants into Indian reservations. See Act of June 30, 1834, Section 20, 4 Stat. 729, 732. To be sure, the Act of March 27, 1854, Section 3, 10 Stat. 269, 270, had stipulated that Indians would no longer be subject to the penalties there announced, but nothing prevented the Tribe from submitting to this law.

to be spelled out. There are several objections. The first is that this kind of speculation, adverse to Indian autonomy, is precisely what is normally forbidden in construing Indian treaties. Moreover, the Treaty of Point Elliott *does* advert to the "laws of the United States" in what we have labelled the "extradition clause" with respect to offenses committed *off* the reservation, and we cannot therefore suppose that the failure to say that such laws applied *within* the reservation as well was other than deliberate.

The suggestion of a common understanding as excusing an express provision would have greater force if contemporaneous Indian treaties *all* remained silent on the point, lending credence to the idea that nothing was said about the applicability of federal law only because it was unnecessary to state the obvious. But that is far from the fact. To be sure, many of the other treaties negotiated with the Indian Tribes of the Pacific Northwest in the mid-Nineteenth Century are equally silent on the point. See, *e.g.*, Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point-no-Point, 12 Stat. 933; Treaty of Neah Bay, 12 Stat. 939; Treaty with the Yakamas, 12 Stat. 951; Treaty with the Nez Perces, 12 Stat. 957; Treaty with the Quinaults, 12 Stat. 971; Treaty with the Flatheads, 12 Stat. 975. Yet, there are revealing exceptions.

Thus, on the very day that the Treaty of Point Elliott was signed (January 22, 1855), another treaty was executed with the neighboring Willamette Indians. 10 Stat. 1143. And, although very similar in other respects, the Willamette treaty expressly provides (Art. VI, 10 Stat. 1145):

> Said Indians further engage to submit to and observe all laws, rules, and regulations which may be prescribed by the United States for the government of said Indians.

It is not easy to explain away as immaterial the omission of a like stipulation in the Treaty of Point Elliott. Is it not fair to conclude that, whereas the Willamette Indians were to be ruled by federal law, the Suquamish were left to govern their own reservation under their own laws?

Nor is the quoted provision of the Willamette treaty a unique exception to an otherwise consistent pattern of silence. Identical stipulations are to be found in the Treaty with the Walla-Wallas, Art. VIII, 12 Stat. 945, 948, and in the Treaty with the Indians of Middle Oregon, Art. VII, 12 Stat. 963, 966. And there are still more explicit provisions for the application of federal law within an Indian reservation. See, *e.g.*, Treaty with the Tabeguache Indians, Art. VI, 13 Stat. 673, 674-675.[22]

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[22] The relevant provision is as follows:

> That the friendship which is now established between the United States and the Tabeguache band of Utah Indians should not be interrupted by the misconduct of individuals, it is hereby agreed that for injuries done no private revenge or retaliation shall take place, but, instead thereof, complaints shall be made by the party injured to the superintendent or agent of Indian affairs, or other person appointed by the President. And it shall be the duty of the chiefs of said Tabeguache band, upon complaint being made as aforesaid, to deliver up the person or persons against whom the complaint is made, to the end that he or they may be punished agreeably to the laws of the United States. And in like manner, if any robbery, violence, or murder shall be committed on any Indian or Indians belonging to said band, the person or persons so offending shall be tried, and if found guilty, shall be punished in like manner as if the injury had been done to a white man.

It may seem odd to suggest that the Suquamish, in the Mid-Nineteenth Century, retained exclusive authority to deal with white offenders against them or their property, when most Tribes had lost that privilege in the preceding decades. See Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951, 953-956 (1975). But federal Indian policy, even in the last century, was not constant (*id.* at 956 and n. 31), and it may well be that, in 1855, it was deemed appropriate to concede greater autonomy to the Indian Tribes.

It is not without significance that, a year earlier, Congress had amended the Indian Intercourse Act to reintroduce the "treaty" exception—omitted in 1834—and to add, for the first time, the "double jeopardy" exception. See *supra*, p. [illegible]. Moreover, as we have noted (note 21, *supra*), the same 1854 Act also exempted Indians from the penalties imposed by the 1834 statute on the introduction of intoxicants into a reservation. And, finally, although still unwilling so to construe Section 1152, it is instructive that the Attorney General in 1855—contradicting his predecessor of 1834 (2 Op. Atty. Gen. 693, 695 (1834))—said it was wrong to foreclose the possibility "of a citizen of the United States becoming subject, in civil matters, or criminal either, to the jurisdiction of the Choctaws." 7 Op. Atty. Gen. 174, 177 (1855).

Not only had federal attitudes changed generally, but it was presumably thought proper to deal more generously with Tribes that had never warred on the United States and were, by contrast to the Indians of the Plains, peaceful fishermen. What is more, the remoteness of the Tribes of the Pacific Northwest and their settlement on relatively very small reservations, presumably justified allowing them greater autonomy than other Indians with larger reservations nearer white settlements. But, at all events, the very explicit provisions with respect to federal jurisdiction over offenses by non-Indians in earlier—and later—treaties (Clinton, *supra*, 17 Ariz.L.Rev. at 955-956, nn. 26-30), suggests that the omission of any comparable stipulation in the Treaty of Point Elliott was not inadvertent.

We anticipate the reply that such an omission in any Nineteenth Century Indian Treaty merely reflects the fact that Indian Trade and Intercourse Acts (now 18 U.S.C. 1152), making federal law applicable to reservation offenses in which both wrongdoer and victim were not both Indians, were already on the books. To exempt a reservation from federal law, it may be argued, silence was not enough; there must be an express stipulation of exclusive tribal authority. This, however, leaves unexplained why it was thought appropriate in the case of the Willamette Indians, and many others, to include in the treaty the explicit provisions we have noticed. Does it not likely indicate a proper recognition that the coastal Tribes of the Northwest were unfamiliar with the United States

Code and would assume that they retained all jurisdiction they were not surrendering by the treaty?

If that is so, "fair dealing" would seem to require an express stipulation if the intention was to deprive them of their internal autonomy. Accordingly, unless we are to impute trickery to the government's negotiators, it would seem right to construe the silences of the Treaty of Point Elliott as impliedly reserving to the Suquamish exclusive criminal jurisdiction over their diminished territory. The consequence would be that 18 U.S.C. 1152 must be held inapplicable by virtue of the "treaty" exception there announced.

2. Very few would challenge this conclusion if the Port Madison reservation had remained as it was in 1855: a small area of truly "Indian country," from which whites were expressly excluded except by consent. In that situation, it would be natural to read the Treaty of Point Elliott as entitling the Suquamish to say to the non-Indian, "you enter on condition of submitting to our laws." But in the changed conditions of today, that is no longer a realistic approach. Yet, the Suquamish—unlike other Tribes—never agreed to the white immigration, or to a revision of their treaty.[23] Nor did the Congress unilaterally terminate their reservation, open it up for non-Indian settlement,[24] or repeal the "treaty" exception to Sec-

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[23] On the contrary, as we have noted (*supra*, p. 25), as late as 1905, when a small portion of the reservation was ceded by the Tribe, the Treaty of Point Elliott was reaffirmed.

[24] By virtue of the General Allotment of 1887 and its amendments (see 25 U.S.C. 348, 43 U.S.C. 1195-1197), the unallotted or "surplus" lands of the reservation might have been "opened

tion 1152 which respected their autonomy. We are thus confronted by the difficult question how much a change in facts, with no change in law, can justify a result at odds with the original understanding.

Have intervening events created insuperable obstacles to our conclusion? Before 1968, it would have been very hard, if not impossible, fully to honor the implications of the Treaty of Point Elliott and to follow the letter of the "treaty" exception in Section

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up" to homesteaders, provided an agreement to that end was made with the Tribe. But, except for the Agreement of 1904 already discussed—which was an outright "cession" to the United States of some 48 acres—no such agreement was entered into. Nor did the Congress act unilaterally to accomplish that result. Indeed, it appears from the 1904 Agreement that, by that date, all the reservations lands had been allotted except only the 48 acres thereby ceded and a further 36 acres. See Art. II (Pet. App. B, p. 18). Presumably, that 36 acres, slightly augmented by restoration (see 25 U.S.C. 463), constitutes the present 41 acres of tribal lands.

It follows that white settlers on the reservation hold what were Indian allotments. This is, of course, contrary to the Treaty of Point Elliott and to the general legislative policy of preserving such allotments to the Indians. But, presumably, it is the consequence of the several exceptions in the law which, on the one hand, allowed sales by the Secretary of the Interior of allotments in heirship, of allotments falling to "incompetents," and of allotments surrendered in lieu of other selections, and, on the other hand, of the premature lifting of trust restrictions which enabled individual Indians themselves to sell their allotments. That was a decision which Congress itself took with respect to two specified allotments on the Port Madison Reservation in 1905 (see Pet. App. B 19), but otherwise left to the discretion of the Secretary of the Interior (see 25 U.S.C. 349, 392). The Tribe itself was not a party to any alienation of lands within the present boundaries of the Port Madison Reservation.

1152. A sufficient reason would have been the anomaly created by leaving major crimes committed by non-Indians to be tried only by tribal courts when the Indians themselves were subject to be tried in federal courts for the same offenses under the Major Crimes Act.[25] Moreover, the situation would have been intolerable on the many reservations, including the Port Madison Reservation, which then had no tribal criminal code or tribal courts.

If these were the consequences, we could not responsibly urge a construction of the Treaty of Point Elliott—or any other Indian treaty—that gave meaning to the "treaty" exception of Section 1152.[26] We would be compelled to ignore the congressional assumption of 1854 that there were then, and would be in the future, treaties which reserved to Indian tribes exclusive jurisdiction over non-Indians. And we would have to yield to the contrary assumption indulged by the Congress since the mid-1880's,[27] abandoning our

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[25] The Major Crimes Act (18 U.S.C. 1153), unlike Section 1152, has no "treaty" exception. The anomaly is lessened, but not removed, if federal jurisdiction under the Major Crimes Act does not oust tribal jurisdiction over the enumerated offenses when committed by Indians. See note 19, *supra*.

[26] The same problem would have arisen whenever a treaty reserved exclusive jurisdiction to the Tribe, whether expressly or impliedly. It is far from clear that, even today, no such express treaty jurisdictional reservations survive. See Clinton, *Criminal Jurisdiction over Indian lands: A Journey through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 531-532 (1976).

[27] We take it for granted that the Congress of 1885 would not have restricted the coverage of the Major Crimes Act to

submission because it "clashes with * * * subsequent history." Cf. *Puyallup Tribe* v. *Washington Game Dept.*, No. 76-423, decided June 23, 1977, slip op. 8. But, fortunately, we are not required to break faith entirely.

The enactment of the Indian Civil Rights Act of 1968 resolves our dilemma. That statute imposes important limitations on the exercise of tribal criminal jurisdiction *regardless of any treaty stipulations.* Most relevantly, tribal courts from that date can impose no sentence exceeding six months' imprisonment and a $500 fine. 25 U.S.C. 1302(7). This, of course, eliminates the anomaly we have just noticed: henceforth, tribal criminal jurisdiction over Indian and non-Indian alike is limited to minor offenses, and is exclusive as to both, while federal courts, by virtue of Sections 1152 and 1153, will deal with all major crimes, without regard to the race of the accused.

To be sure, there is no evidence that the Congress of 1968 was conscious of surviving treaty stipulations that brought into play the "treaty" exception of Section 1152. But that no more matters than that those who wrote the General Allotment Act of 1887 and comparable "opening-up" legislation in the following years presumably did not appreciate that they were, as a practical matter, foreclosing implementation of treaty commitments. If unintended consequences to the detriment of tribal autonomy can flow

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offenses committed *by* Indians if it had believed non-Indians committing like offenses on the same reservations were, by treaty, subject to exclusive tribal jurisdiction.

from congressional action, surely it is right to allow the reverse to happen also. If new legislation, whatever its purpose, now makes it possible partially to enforce treaty undertakings, never abrogated, it should be given that effect.

Accordingly, we believe the Indian Civil Rights Act should be deemed to suspend,[28] *pro tanto,* any existing treaty stipulation reserving exclusive—and heretofore unregulated—criminal jurisdiction to the Tribe, and to amend the "treaty" exception in Section 1152 to that extent. This retrenchment—ironically, it may be—allows promises made more than a century ago to be revived, consistently with contemporary policy.[29] And, at the same time, we can avoid doing violence to "justifiable expectations" indulged

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[28] We say "suspend" advisedly. The conclusion that a treaty stipulation in favor of the Indians has been permanently abrogated by unilateral action of the United States is to be avoided, if at all possible. See *Menominee Tribe* v. *United States, supra,* 391 U.S. at 412-413. The time may come when the Congress deems it right to lift, in part or in whole, the limitations on the sentencing powers of tribal courts and, should that happen, the treaty stipulations, still in existence, can recover more or all of their original effect. Needless to say, a Congress minded to lift such limitations would also amend or repeal the Major Crimes Act so as to avoid any conflict or incongruity.

[29] Saving by narrowing is, of course, not a novel jurisprudential technique. One need only remember that the historic power of federal courts to punish for criminal contempt was saved by limiting penalties to those available for petty offenses and that a statute enacted without thought of the problem (18 U.S.C. 1) was invoked in aid of that result. See *Muniz* v. *Hoffman,* 422 U.S. 454, 475-477, and cases there cited.

by white settlers since the 1890's. See *Rosebud Sioux Tribe* v. *Kneip, supra,* slip op. 21. Moreover, this solution eliminates almost all potential conflicts of jurisdiction, and, the *McBratney* exception aside, subjects everyone within the reservation boundaries to the same laws and the same courts for like offenses.

3. But even if, contrary to our submission, the Court is not satisfied that the Treaty of Point Elliott effectively reserves to the Tribe *exclusive* jurisdiction over the reservation, it does not follow that tribal criminal jurisdiction over non-Indians is at an end. We can honor the original understanding by construing Section 1152—at least as applied to reservations established by treaties that do not affirmatively relinquish tribal criminal jurisdiction—as *supplementing,* rather than wholly *supplanting,* tribal jurisdiction.

For this purpose, we cannot rely on the letter of the "treaty" exception, which in terms embraces only instances in which treaty stipulations reserve to the tribe "exclusive" jurisdiction. We must examine Section 1152 as a whole, applying the usual presumption, to determine if it does not confer on the United States only a jurisdiction concurrent with whatever tribal authority independently exists, where it has not been expressly surrendered.

On its face, Section 1152, when it applies federal law,[30] does not thereby oust concurrent tribal juris-

[30] By virtue of the Assimilative Crimes Act, 18 U.S.C. 13, that may of course be "borrowed" state law. But, under most circumstances, state law and the jurisdiction of state courts are excluded when Section 1152 applies. See *Williams* v. *United States,* 327 U.S. 711, 713-714 and n. 10.

diction. It is, of course, clear that the reference in the provision to "the sole and exclusive jurisdiction of the United States" is no more than a way of identifying *which* federal laws are rendered applicable. These words do not prejudice the question whether, in "Indian country," federal jurisdiction shall be exclusive or concurrent. *In re Wilson,* 140 U.S. 575, 578. Indeed, even the reference is now erroneous, since the laws intended to be invoked are presumably those which apply within the "special maritime and territorial jurisdiction of the United States," a term defined as including "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive *or concurrent* jurisdiction thereof * * *." 18 U.S.C. 7 (emphasis added).

Nor is the question foreclosed by the limited exceptions made in Section 1152. That Indians committing offenses against other Indians or their property are *wholly* beyond the reach of federal law (except for major crimes since 1885) hardly decides whether non-Indians are ever subject to concurrent tribal jurisdiction. And the same reasoning applies to the "treaty" exception; the provision exempting from federal law all persons committing offenses which a treaty reserves for *exclusive* tribal jurisdiction, does not imply that there can be no concurrent tribal jurisdiction over non-Indians.

More troublesome, to be sure, is the second exception, in effect barring reprosecution of Indians al-

ready punished by the Tribe. If concurrent tribal jurisdiction over non-Indians were contemplated, one might expect the "double jeopardy" provision to embrace that situation also. It may be that, when Section 1152 was last amended in 1854, tribal prosecution of non-Indians on reservations, then very few in number, was such a rare occurrence as not to seem a matter requiring legislative attention. We do know that the 1854 amendment which introduced the "double jeopardy" exception as a rider to a special bill dealing with the Arkansas Territory was provoked by a particular incident involving reprosecution of an Indian, and it seems likely that Congress was merely addressing the problem at hand. See 28 Cong. Globe 701 (1854).

But, at all events, it is dangerous to rest any conclusion on the asymmetry of a statute that does not always mean what it seems to be saying. We need only remind ourselves that, although Section 1152 nowhere exempts from federal jurisdiction offenses by one non-Indian against another on reservation land, this Court has consistently so held. *United States* v. *McBratney, supra*; *Draper* v. *United States, supra*; *New York ex rel. Ray* v. *Martin, supra,* and see *United States* v. *Antelope, supra,* slip op. 2 n. 2, 3 n. 4, 7 n. 9.

What is more, the same "double jeopardy" exception in Section 1152 gives a strong indication in the opposite direction. Indeed, the provision makes it plain that the federal jurisdiction conferred by Section 1152 is *not* always exclusive. Although Indians

committing offenses against non-Indians are normally subject to federal law, the statute obviously does not contemplate that this precludes such persons being "punished by the local law of the tribe." And, this being so, it would be natural to conclude that, in other situations also, Section 1152 merely creates concurrent federal jurisdiction.

This conclusion is bolstered, we believe, by the "treaty exception." As we have observed, that clause of Section 1152 *wholly* exempts cases over which, by treaty, the Tribe has retained "exclusive jurisdiction." Does this not suggest that there are other instances in which the Tribe has retained *concurrent* jurisdiction, and that, accordingly, federal laws, although applicable, will not pre-empt local laws?

At the least, it seems reasonable to read Section 1152 as never ousting tribal jurisdiction when it independently exists. In some cases, tribal authority may have been surrendered; in others, there may have been no effective tribal law or tribal courts, with the consequence that federal jurisdiction was in practice exclusive. But, in all other situations, Section 1152, we suggest, was only meant to supplement tribal authority.

4. One must concede that prevailing opinion for some time has opposed the view that the federal jurisdiction conferred by Section 1152 is only concurrent with that retained by the Tribe. But that is not an insuperable obstacle. As the majority and dissenting opinions below sufficiently show, the legislative history of the 1834 Act and the amending Act

of 1854 is too sparse, and too ambiguous, to furnish a safe guide.[31] And uncritical congressional assumptions since then do not meaningfully reveal the original understanding. See *Williams* v. *United States*, *supra*, 327 U.S. at 714-715 n. 10. Nor do the published views of the Attorney General and of the Department of the Interior. Moreover, the general assumption is demonstrably grounded on a false premise.

The simplistic view, too commonly indulged, is that Section 1152 leaves the Tribes with criminal jurisdiction only of cases in which both wrongdoer and victim are Indians. But, as we have noted, the "double jeopardy" exception makes it clear that this is not so. That erroneous starting point is enough to invalidate the conclusion stated by the Attorney General in 1834. 2 Op. Atty. Gen. at 695. What is more, that Opinion also wrongly assumes that the

[31] The meager legislative history of the amending Act of 1854 tells us only (as already noted, *supra*, p. 40) that its stimulus was the case of an Indian who, although already punished under tribal law, was prosecuted in federal court for violating the prohibition on bringing intoxicants into the reservation. This led to (1) an amendment of the 1834 Act exempting Indians from the "ardent spirits" importation penalties, (2) the addition of the "double jeopardy" exception to Section 1152, and (3) an express reaffirmation of the "treaty" exception to Section 1152, included in the Indian Intercourse Act of 1817 (3 Stat. 383), but dropped by the 1834 Act. Because the Congress of 1854 indulged different assumptions about the proper scope of tribal autonomy, the indications of congressional views in enacting the earlier statutes—ambiguous in any case—offer little guidance as to the true construction of Section 1152, the present scope of which was not settled until 1854.

Treaty with the Choctaws and all other Indian treaties affecting lands west of the Mississippi relinquished tribal jurisdiction over all but cases involving Indians only (*ibid.*), a view repudiated by a subsequent Attorney General in 1855. See 7 Op. Atty. Gen. at 177-179.

The only remaining embarrassments are the 1855 Opinion of the Attorney General, just cited, and the decision in *Ex parte Kenyon*, 14 Fed. Cas. 353 (C.C. W.D. Ark.) (No. 7,720), both of which perpetuate the error of reading the first exception in Section 1152 as stripping tribal courts of all jurisdiction except when wrongdoer and victim are both Indians. But, in both instances, the controversy was about entirely discrete matters [32] and the view given of Section 1152 as applied here is mere dictum. A more recent Department of Interior opinion embracing the same view, 77 I.D. 113, has now been withdrawn.

In these circumstances, we submit it is not too late to reinstate the true rule announced by Section 1152: that federal jurisdiction within an Indian reservation, except as to major crimes, is only supplementary to whatever independent authority tribal courts have not voluntarily surrendered.

5. Our solution, to be sure, requires some accommodations to be made. But we do not think any of the potential difficulties are insuperable. Indeed, we

[32] The Attorney General was answering a question about *civil* jurisdiction; the *Kenyon* case involved an offense committed *outside* the territorial jurisdiction of the tribal court, as this Court noted in *Elk* v. *Wilkins*, 112 U.S. 94, 108.

are told that in the State of Washington, a number of Tribes "routinely assert jurisdiction over non-Indians for offenses against their law and order codes" and that this happens "without particular problems or objections." [33]

Our primary submission—*exclusive* tribal jurisdiction for minor offenses—of course avoids potential jurisdictional conflicts. But these are, in any event, unlikely. The existence of concurrent criminal jurisdiction is not novel. On the contrary, it is a familiar fact of life in this federal republic. Moreover, while under our alternative submission, tribal and federal courts would, in theory, both have jurisdiction over *all* offenses committed by non-Indians on the reservation—except only those in exclusive state jurisdiction under the *McBratney* rule—the practice will be very different. Because of the severe limitation on the sentencing power of tribal courts, serious offenses will continue to be dealt with by federal courts, applying federal law. For the minor crimes as to which their sentencing power is adequate, it will presumably be a rare instance when federal prosecutors will not be content to leave the matter to tribal authorities—as in the present cases.

There is, accordingly, little cause for concern that multiple prosecutions—assuming no constitutional bar [34]—will result. The fear that the Tribe may

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[33] Brief of Governor of the State of Washington in Opposition, p. 8 and n. 18.

[34] See *United States* v. *Wheeler*, 545 F. 2d 1255 (C.A. 9), certiorari granted October 3, 1977, No. 76-1629.

seek to immunize its own members by prosecuting first—whatever its validity under the law as presently applied—is of course irrelevant to our submission, which concerns only the trial of non-Indians. And, since the federal authorities will normally stay their hand, there will be very few occasions for a second prosecution by tribal authorities dissatisfied with the result in federal court.

Both our submissions, it is true, encounter potential objections to subjecting non-Indian residents of the reservation to tribal law and tribal courts when they are excluded from the law-making process and its administration. In one sense, this is no different from the situation of anyone residing in a foreign country; absent special extra-territoral arrangements, he must submit himself to the law and the courts of the country which he has chosen to enter. *E.g. Wilson* v. *Girard*, 354 U.S. 524, 529. Indeed, that principle has been applied to Indian reservations in the past. See Clinton, *supra*, 17 Ariz. L. Rev. at 953-954.

On the other hand, it is arguable that white residents of Indian reservations, some of whose ancestors settled long ago at the invitation of the federal government, under the assumption that they would not be subjected to tribal law, have a strong claim. That concern has been importantly reduced by the Indian Civil Rights Act, 25 U.S.C. 1301, 1302, 1311. Nevertheless, at the end of the day, it may be that the Tribes will have to choose between narrowing the territorial jurisdiction of their laws and courts or ad-

mitting non-Indian residents to participation, at least on juries. But, as the court of appeals stated, that is a matter that need not be resolved at this stage of the litigation.[35]

Our proposed solution has positive advantages, however. It lessens the problem of determining the race of the accused, by-passing the knotty question who is an "Indian" for jurisdictional purposes. It minimizes the uncomfortable—if constitutional (see *United States* v. *Antelope*, *supra*)—disparities of treatment based on race. Henceforth—except only with respect to crimes not affecting tribal interests—all persons within the same reservation accused of minor crimes would be dealt with under the same rules. And, of course, our submission advances the important policy of tribal self-government. See Final Report of the American Indian Policy Review Commission (1977).

D. Existence And Extent Of State Jurisdiction

Thus far, in discussing the extent of federal criminal jurisdiction on Indian reservations, we have assumed that State criminal law has no application,[36] and state courts have no jurisdiction, except only in the *McBratney* situation.[37] But there *is* a claim that

[35] Equally premature are other Due Process questions relating to the *procedures* followed by tribal courts.

[36] Except as "borrowed" law under the Assimilative Crimes Act when there is no substantive federal enclave law defining the offense.

[37] We have already indicated why these cases are not governed by *McBratney* and its progeny. *Supra*, p. 16; and see note 20, *supra*.

the State of Washington has validly asserted criminal jurisdiction over the Port Madison Reservation, and, if that contention is correct, it may override all we have said about federal and tribal court competence. Accordingly, we must address the question.

1. State jurisdiction, the *McBratney* situation aside, can only be validly asserted by leave of the United States. See, *e.g.*, *Antoine* v. *Washington*, 420 U.S. 194, 205. Such permission, in turn, may be given by the Act of admission (in the case of non-original states) or by subsequent Congressional legislation. There is, however, no suggestion that the Washington Enabling Act (25 Stat. 676) authorized the state to apply its laws to Indian reservations. On the contrary, as we shall have occasion to notice in a moment (*infra*, pp. 54-55), the Act expressly reserves Indian lands and the Washington Constitution expressly disclaimed jurisdiction over such areas. Sole reliance is placed on Public Law 280 (67 Stat. 588), enacted by Congress in 1953, and we accordingly begin our examination there.

Relying on that federal statute, the State of Washington, in 1957, enacted legislation which asserted full civil and criminal jurisdiction over Indian reservations within the state, to become effective, however, only upon the consent of any affected tribe.[38] Wash.

[38] Although tribal consent has only become necessary, as a matter of federal law, since 1968 (see 25 U.S.C. 1321), Washington determined, in 1957, to condition state jurisdiction on the Tribe's acquiescence. See Wash. Laws of 1957, ch. 240, § 2 (Pet. App. B, p. 29). There is an important difference,

Laws of 1957, ch. 240. The following year, the Suquamish Tribal Council asked the state to assume full jurisdiction (Pet. App. B 30-31) and the Governor accordingly declared state "criminal and civil jurisdiction" applicable to the Port Madison Reservation on May 15, 1958 (Pet. App. B, p. 32).

Five years later, in 1963, Washington enacted a further statute assuming jurisdiction over Indian reservations where tribal consent has not been forthcoming, [illegible] exempting, except as to eight listed matters, "Indians when on their tribal lands or allotted lands" within a reservation, provided such lands are held in trust or subject to a restriction against alienation. Wash. Laws 1963, ch. 36 (Pet. App. B, pp. 32-33). Although these provisions then had no direct application to the Port Madison Reservation, they became relevant because when, in 1971, the State Governor retroceded jurisdiction over the reservation to the United States (authorized since 1968 by 25 U.S.C. 1323), he expressly excepted the jurisdiction "provided under Chapter 36, Laws of 1963." (Pet. App. B, pp. 35-36).[39] And the acceptance of retroces-

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however: the Washington statute of 1957 required only acquiescence by the tribal council, whereas federal law now requires the tribal members themselves to make the decision to submit to state jurisdiction. *Kennerly* v. *District Court of Montana*, 400 U.S. 423.

[39] Presumably, the Governor felt himself authorized, at the request of the Tribe (Pet. App. B 34), to return that jurisdiction which the State had assumed only by tribal consent, but not to override the State legislative decision to impose a limited jurisdiction, regardless of tribal acquiescence.

sion by the Secretary of the Interior recites the same exception (Pet. App. B, p. 36).

From this chronology, it is apparent that, assuming the action of the Governor in retroceding jurisdiction became effective upon federal acceptance, as the court of appeals held (we believe correctly),[40] the question of state jurisdiction in these cases turns on the Washington law of 1963. For the *Oliphant* case, where the incident occurred on tribal trust lands and does not involve any of the eight special matters, the issue would be whether the 1963 law excepts only offenses committed *by* Indians on such trust lands, or all offenses *involving* Indians. In *Belgarde*, on the other hand, the facts bring it within state jurisdiction as defined by the 1963 statute and the only question is whether that jurisdiction *pre-empted* tribal law and the competence of tribal courts, or was merely *concurrent*, as the district court held. These are difficult issues which have not been addressed by the court of appeals,[41] and which may not be appropriate for initial consideration here.

But before construing the 1963 law, it is necessary to determine its validity. The Court of Appeals for

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[40] The Washington Supreme Court has apparently also accepted the validity of this retrocession. See *Tonasket* v. *State*, 84 Wash. 2d 164, 166-167 n. 2, 525 P. 2d 744, 746, n. 2.

[41] In *Oliphant* (the only case it considered), the court of appeals simply ignored the 1963 Washington statute. That may be because the validity of this law was then under consideration by the court in the *Yakima* case, as described in the text immediately following.

the Ninth Circuit has now declared it unconstitutional. *Confederated Bands and Tribes of the Yakima Indian Nation* v. *State of Washington*, 550 F.2d 443, remanded, 552 F. 2d 1332, rehearing denied, No. 74-1225, July 1, 1977. If that decision stands, it will be unnecessary to construe Washington's 1963 law. And, although an appeal to this Court has been filed, it would seem premature to consider in these cases State law issues which may become moot by dismissal of the appeal or affirmance of the judgment in *Yakima*. Nor do we think it appropriate to discuss here the constitutional question which this Court has not yet agreed to review in the case where it is directly presented.

There are, moreover, independent non-constitutional grounds for questioning the validity of the Washington statute of 1963—one of which also applies to the 1957 statute. These depend on the construction of Public Law 280, which, it may be, did not authorize the State of Washington to assume jurisdiction when and how it purported to do. The same prudential considerations probably argue against deciding these issues here. But we outline them briefly because, unlike the questions peculiar to the Washington law of 1963, they have been decided by the court of appeals, albeit in other cases, and they have continuing importance for Indian law in other states.

2. Public Law 280 ceded to certain listed states full criminal jurisdiction over "Indian country" within the state's boundaries, to the exclusion of federal jurisdiction, effective immediately and without any requirement of action by the state or by the affected Tribes. 18 U.S.C. 1162. Neither as originally enacted, nor as later amended (68 Stat. 795; 72 Stat. 545; 84 Stat. 1358), did this "automatic" jurisdiction provision apply to the State of Washington. Nevertheless, the terms of that portion of Public Law 280 may be relevant in construing the "optional" jurisdiction provisions which are now invoked. We particularly note that, where "automatic" jurisdiction is ceded over "offenses committed by or against Indians," it is to be exercised "to the *same extent* that such State * * * has jurisdiction over offenses committed elsewhere within the State * * *"; that "the criminal laws of such State * * * shall have the *same force and effect* within such Indian country as they have elsewhere within the State * * *" (18 U.S.C. 1162(a)); and that the special federal criminal jurisdiction provisions (18 U.S.C. 1152), including the Major Crimes Act (18 U.S.C. 1153), are henceforth inapplicable (18 U.S.C. 1162(c)).

With this preamble, we examine the provisions of Public Law 280 which are directly applicable, Sections 6 and 7. These sections authorized any unlisted state, without tribal consent and "[n]otwithstanding the provisions of any Enabling Act for the admission of a State," to "amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption

of civil and criminal jurisdiction in accordance with the provisions of this Act" and, thereafter, "to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." Section 6 (now codified as 25 U.S.C. 1324) states that "the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be."

3. Two threshold questions are raised by these sections. The first is whether a state was free to assume less than full criminal jurisdiction. Under those provisions, a state could assume both criminal and civil jurisdiction, or one or the other. But was it authorized to exercise a partial, or limited, jurisdiction, whether for civil or criminal cases?

It is at least arguable that the phrase "in accordance with the provisions of this Act," without more,[42] incorporates by reference the requirement in the "automatic" jurisdiction section that criminal jurisdiction, if assumed at all, must be "to the same extent" and with "the same force and effect" as elsewhere in the state—which is to say, full jurisdiction over all criminal matters normally within state competence,

[42] It is otherwise since the 1968 amendment (25 U.S.C. 1321(c)), which expressly permits partial assumptions of jurisdiction by mutual consent of the State and the affected Tribe.

to the exclusion of federal criminal law."[43] That would seem the natural meaning and it fits with the legislative concern to end the "hiatus in law-enforcement authority" created by limited federal authority and often non-existent or not functioning tribal mechanisms. See H. R. Rep. No. 848, 83d Cong., 1st Sess. 5-6 (1953), quoted in *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 379-380.

A majority of the Court of Appeals for the Ninth Circuit, in its *en banc* decision in the *Yakima* case, has concluded otherwise. See *Confederated Bands and Tribes of the Yakima Indian Nation* v. *State of Washington*, 552 F. 2d 1332. But we think the dissent in that case more persuasive. In our view, the majority dismisses too quickly the indications that the 1968 amendment to Public Law 280, henceforth permitting partial state assumptions of jurisdiction with tribal consent (25 U.S.C. 1321(a); cf. *Kennerly* v. *District Court of Montana*, *supra*, 400 U.S. at 429-430 and n. 6), was viewed as a change. See 550 F. 2d at 447 n. 10; compare 550 F. 2d at 455-456 and n. 20. And the court overlooked that any current arrangement for divided jurisdiction established before 1968 which serves the interests of the affected Tribe can now be ratified by both the Tribe and the State,[44] consistently with present congressional policy

[43] See 18 U.S.C. 1162(c), making Sections 1152 and 1153 inapplicable to "automatic" jurisdiction states.

[44] To be sure, congressionally mandated procedures must be followed: the tribe must express its consent by referendum and the State must pass legislation. *Kennerly* v. *District Court*

to condition any such arrangement on mutual consent.

4. The other question, equally unnoticed in the proceedings below, is whether the State of Washington has complied with the prerequisite to assuming jurisdiction of "appropriately amend[ing] [its] State constitution" "where necessary." Washington did not amend its Constitution and it is not obvious why this omission is not fatal to its assertion of criminal jurisdiction. See *McClanahan* v. *Arizona State Tax Comm'n, supra,* 411 U.S. at 177-178; *Clinton, supra,* 18 Ariz L. Rev. at 566 n. 339. Indeed, the relevant provision of the Washington State Constitution, Art. XXVI, par. Second (R.C.W.A. 1966), expressly disclaims "all right and title" to "all lands * * * owned or held by any Indian or Indian tribes," which "shall remain under the absolute jurisdiction and control of the Congress of the United States." This territorial description includes the *whole* of the Port Madison Reservation, whoever the patentee. See 18 U.S.C. 1151; *Seymour* v. *Superintendent, supra,* 368 U.S. at 358. The only issue is as to the scope of the words "absolute jurisdiction and control."

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of Montana, supra, 400 U.S. at 427-429. So, also, if the State involved is one of those (like Washington) that must amend its constitution under Section 6 of Public Law 280 (now 25 U.S.C. 1324), this prerequisite to assuming jurisdiction, if not already satisfied, must be complied with. See below, pp. 54-58. But, since 1968, there is no restriction on mutually agreed arrangements for divided or concurrent jurisdiction, temporary or permanent. *Id.* at 430 and n. 6.

It is difficult to read those words as not leaving "Indian country" as free from state law as it was before statehood. Certainly, the construction of similar language in the Alaska Statehood Act, premised on the unique situation of the natives there, past history, and particularized legislative history, does not clearly control the question. See *Kake Village* v. *Egan,* 369 U.S. 60. But even if "absolute" does not necessarily mean "exclusive," *id.* at 68, the explicit recognition that the federal Congress retained " 'absolute jurisdiction and control' " over Indian country must mean that federal criminal laws would continue to apply there, at least concurrently. Yet, since assumption of jurisdiction under Public Law 280 makes the only significant federal criminal jurisdictional statutes (18 U.S.C. 1152 and 1153) inapplicable,[45] it would seem to follow that the state could not assert criminal jurisdiction exclusive of federal jurisdiction without amending its constitutional provision.

To be sure, that question has been decided by the Washington Courts and by the Court of Appeals for the Ninth Circuit so as not to require a state constitutional amendment before the state could validly exercise jurisdiction, civil or criminal, pursuant to Public Law 280. See *Makah Indian Tribe* v. *State,* 76 Wash. 2d 485, 457 P. 2d 590, appeal

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[45] We indulge the prevailing assumption that the exclusion of federal jurisdiction under Sections 1152 and 1153, in terms effective as to listed states where "automatic" jurisdiction was ceded by Public Law 280 (18 U.S.C. 1162(c)), is likewise effective as to "optional" states, at least *pro tanto.* See *supra,* pp. 51-53.

dismissed, 397 U.S. 316;[46] *Quinault Tribe of Indians* v. *Gallagher*, 368 F. 2d 648, certiorari denied, 387 U.S. 907. And, more recently, in the *Tonasket* case, after the question had been suggested in this Court and the case was remanded, 411 U.S. 451, the Washington Supreme Court adhered to that ruling. *Tonasket* v. *State*, 84 Wash. 2d 164, 525 P. 2d 744. But, although this Court dismissed an appeal from that judgment, 420 U.S. 915, the question would appear to remain open here.[47]

In our view, the argument against valid assumption of state jurisdiction is substantial. We do not elaborate it here, but note only three points. First, the Washington Court's reliance in *Tonasket* on *Kake Village* v. *Egan*, 369 U.S. 60, seems to us largely misplaced, since this Court was not there relying on Public Law 280 as ceding jurisdiction to Alaska, and was dealing with non-reservation Indians. See *McClanahan*, *supra*, 411 U.S. at 176 n. 15. Second, *Tonasket* aside, the state and federal court decisions antedate *Kennerly* v. *District Court*

[46] The question suggested here was not presented by the Jurisdictional Statement in that case. See No. 922, O. T. 1969.

[47] While the Jurisdictional Statement in that case did present the issue, this Court may have concluded that the question was not "substantial" because of intervening State legislation (mentioned in the remand order, 411 U.S. 451) which exempted from taxation any sale of two cartons of cigarettes even to a non-Indian. See *Tonasket* v. *State*, *supra*, 84 Wash. 2d at 182-183, 525 P. 2d at 755. Indeed, the United States had suggested as much before the remand of this Court. See Brief for the United States as Amicus Curiae in No. 71-1031, pp. 17-19.

of Montana, 400 U.S. 423, which stressed, on an analogous issue, that exact compliance with the procedures required by Public Law 280 is essential before state jurisdiction attaches. Finally, the legislative history of Public Law 280 shows that Congress believed the State of Washington, together with 7 other states for whose benefit Section 6 was written, would have to amend its Constitution before it could assume jurisdiction over Indian reservations. See 99 Cong. Rec. 10782 (1953); Hearings on H. R. 1063, jointly before the House Subcommittee on Indian Affairs, and the House Committee on Interior and Indian Affairs, 83d Cong. 1st Sess. (1953) (unpublished).[48]

Ordinarily it would be for the state courts finally to construe the State Constitution. But one may doubt if this is so when the question is whether the state has complied with a federally-imposed condition to a cession of jurisdiction over an Indian reservation, and the condition is premised on a Congressional reading of the State Constitution provision which was, in fact, a literal transposition of words written by Congress in the Washington Enabling Act. Cf. *Kennerly*, *supra*. If, then, the question is one of federal law,

[48] A transcript of these hearings was submitted to the Court by the United States in the *Tonasket* case (No. 71-1031) and was before the Court in *Bryan* v. *Itasca County* (No. 75-5027). See 426 U.S. at 383 n. 9. The most pertinent passages of these hearings are reproduced in the opinion of the dissenting Justices of the Washington Supreme Court in *Tonasket* v. *State*, *supra*, 84 Wash. 2d at 186-192, 525 P. 2d at 758-761.

to be judged by federal standards, we believe it probable that it would be resolved against the state.

5. If the state constitutional amendment question we have just alluded to were deemed open and were decided against the state, that would be the end of any claim of state criminal jurisdiction in these cases. Resolution of that question the other way, however, would require further consideration of the several state actions purporting to extend criminal jurisdiction, and later retroceding at least some part of it.

So, also, a ruling that, under Public Law 280—until the 1968 amendment—an "optional" state (like Washington) must extend all its criminal laws to a reservation, or none, would effectively end the claim of state jurisdiction in both the present cases. This is so because the limited assertion by the State of Washington of jurisdiction in 1963 would be invalid and the retrocession of 1971 must then be read as complete, treating the exemption for the 1963 Act as not written.

In these circumstances, one is tempted to invite the Court now to decide one or both of the broader questions under Public Law 280, just discussed. These issues, affecting jurisdiction over Indian country well beyond the boundaries of the State of Washington,[49] ought to be definitely resolved by this

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[49] However, a ruling here upholding either objection to assertion of state jurisdiction will have no serious disruptive effect. Of the eight States where Congress believed a constitutional amendment was required, to date Washington is the only state that has purported to assume general, nonconsensual jurisdiction over Indian country. And, as we have already said, existing arrangements for divided jurisdiction over reservations in other States can be ratified by mutual agreement.

Court. Although they were not addressed by the Court of Appeals for the Ninth Circuit in these cases, that court has expressed its considered view on the two questions in other cases and no purpose would be served by requiring the court of appeals to face them anew. Yet, because of our posture as an *amicus* in these cases, we hesitate to inject new questions at this stage.

Accordingly, we suggest the following course:

(1) that the Court defer argument in the present cases until it determines whether to grant plenary review in the *Yakima* case; (2) if the appeal in *Yakima* is dismissed, or the judgment is summarily affirmed, all state jurisdictional claims in these cases having been effectively eliminated, the Court could then decide these cases by reaching only the question whether subsisting federal jurisdiction ousts tribal court competence (see Parts A, B and C, *supra*), and the minor (and in our view clear) question of the validity of the State Governor's 1971 retrocession; (3) if the Court determines to hear the *Yakima* appeal, where the arguments we have outlined above will be open to the appellees in defending the judgment, the Court might appropriately set the present cases for oral argument at the same time.

CONCLUSION

Subject to resolution of the state jurisdiction claim in these cases or in *Yakima*, as just discussed, the United States urges affirmance of the judgments in both the present cases.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DREW S. DAYS, III,
Assistant Attorney General.

JAMES W. MOORMAN,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
Special Assistant to the Solicitor General.

WALTER W. BARNETT,
MIRIAM R. EISENSTEIN,
Attorneys.

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